

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of National Biodiesel Board)	
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Filing Date: September 3, 2020)	Case No.: FIA-20-0043
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Issued: September 18, 2020

Decision and Order

On September 3, 2020, National Biodiesel Board (Appellant) filed an Appeal from a Freedom of Information Act (FOIA) Interim Response Letter issued by the Department of Energy's (DOE) Office of Public Information (OPI) (FOIA Request No. HQ-2020-01054-F). In the Interim Letter, OPI denied the Appellant's request for expedited processing of his request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. The Appellant challenged the denial.¹ As explained below, we deny Appellant's appeal.

I. Background

On August 13, 2020, the Appellant submitted a FOIA request seeking the following information:

Records regarding petitions pursuant to CAA section 211(o)(9)(b) and 40 [C.F.R.] 80.1441(e)(2) that the Department of Energy has evaluated and scored since January 29, 2020 (and through the final disposition of this request). Additionally, please provide any records, such as memoranda of understanding (MOU), on arrangements between the Environmental Protection Agency and the Department of Energy regarding the process for evaluating and scoring such petitions since 2016.

FOIA Request at 1 (August 13, 2020). OPI denied the Appellant's request for expedited processing stating that the request did not demonstrate that it concerned a matter of current exigency to the American public or that delaying a request would compromise a significant recognized interest. Interim Response at 2 (August 20, 2020).

¹ The Appellant also challenged OPI's Supplemental Interim Response dated August 31, 2020, in which OPI categorized it as a "commercial requester." However, after reviewing new information from the Appellant, OPI has subsequently decided to re-categorize the Appellant as an "other" requester. *See* Further Supplemental Interim Response Letter dated September 9, 2020. Therefore, we need not review this portion of the Appeal. If the Appellant disagrees with OPI's new determination regarding its re-categorization, it may file an appeal with OHA regarding the OPI's new determination on that issue.

On September 3, 2020, the Appellant appealed the denial. The Appellant primarily asserts that its request for documents related to small refinery exemption petitions concerns a matter of current exigency because “small refinery exemption petitions since January 29, 2020” are subject to the 10th Circuit’s holding in *Renewable Fuels Association v. United States Environmental Protection Agency* (EPA), 948 F.3d 1206 (10th Cir. 2020)(*Renewable Fuels Ass’n*); Appeal at 1.² The Appellant also relies on statements from “a May 20, 2020, hearing of the Senate Energy and Natural Resources Committee to consider the nomination of Mark Menezes to be U.S. Department of Energy (DOE) Deputy Secretary of the Agency.” Appeal at 1. During the hearing, then-Under Secretary (hereinafter “Deputy Secretary”) Menezes stated, “[A]s [the] EPA sends over these [petitions], to be consistent with the 10th Circuit decision, [DOE] will review them expeditiously, and will return them as promptly as we can...to the EPA with our determinations as we have done in the past.” *Id.* The Appellant asserts that the Deputy Secretary’s testimony, coupled with statements from various U.S. Senators (such as those from Senator Mike Lee who commented that “it’s an important issue”), further indicates that the information the Appellant requested involves a matter of current exigency. Appeal at 1–2.

Finally, the Appellant argues that delaying a response to provide the requested information will compromise the interests of the American people in several court cases because “[r]efiners have indicated that they will ask the U.S. Supreme Court for a writ of certiorari to review the [10th Circuit’s] decision.” Appeal at 1.

II. Analysis

Generally, agencies process FOIA requests on a “first in, first out” basis, according to the order in which they are received. Granting one requester expedited processing gives that person a preference over previous requesters by moving his request “up the line” and delaying the processing of earlier requests. Therefore, the FOIA provides that expedited processing is to be offered only when the requester demonstrates a “compelling need” or when otherwise determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i); *see also* 10 C.F.R. § 1004.5(d)(6).

“Compelling need” is defined in two ways under the FOIA. First, compelling need exists when failure to obtain the requested records on an expedited basis “could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” 5 U.S.C. § 552(a)(6)(E)(v)(I). Compelling need may also exist “with respect to a request made by a person primarily engaged in disseminating information,” where there is an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II). In order to determine whether a requester has demonstrated an “urgency to inform,” courts, at a minimum, must consider three factors: (1) whether the request concerns a matter of current exigency to the American public;

² The Court in *Renewable Fuels Ass’n* heard a challenge to extensions of small refinery exemptions (SRE) that had been granted by the EPA regarding Renewable Fuel Standards (RFS) in effect pursuant to the Clean Air Act. *See* 42 U.S.C. 7401 (Section 211(o)(9)(A)(i)). The Court held that “[t]he EPA exceeded its statutory authority in granting these petitions” because the refiners had not received exemptions in the previous year. *Renewable Fuels Ass’n* at 1214, 1244–45. Under the exemption process, the EPA either grants or denies small refinery SRE petitions. 40 CFR 80.2(b); *See* 40 CFR § 80.1441 (small refinery exemption); 42 USC § 7545(o)(9)(B)(iii); 40 CFR 80.1141(e)(2). DOE’s only role in this process is to make findings of SRE report scores from an analysis of a 2011 study and provide the EPA with SRE report scores and findings regarding “disproportionate economic hardship.” 42 USC § 7545(o)(9)(B)(ii); *see Renewable Fuels Ass’n* at 1223–24.

(2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001).

As an initial matter, we note that the Appellant has not claimed that a failure to expedite the processing of its FOIA request would pose any type of threat to an individual's life or physical safety. The Appellant must therefore demonstrate an "urgency to inform" the public about an activity of the federal government.³ In its Interim Response, OPI stated that the Appellant failed to identify "an actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner." Interim Response at 2. OPI therefore determined that the Appellant "did not sufficiently address factors one or two" of the "urgency to inform" test. *Id.*

Although the Appellant's FOIA request clearly concerns federal government activity, we find that it fails to satisfy either of the first two factors of the three-factor "urgency to inform" test outlined above. First, the Appellant fails to establish that the request concerns a matter of current exigency to the American public. Although the Appellant is correct in stating that, since January 29, 2020, small refinery petitions have been subject to the 10th Circuit's holdings in *Renewable Fuels Ass'n*, its reliance on that case is misguided as it relates to showing an urgency to inform. In *Renewable Fuels Ass'n*, the Court's holdings applied only to the EPA. The case involved three EPA orders that granted extensions of the small refinery exemption to the Clean Air Act for three small refineries. *Renewable Fuels Ass'n* at 1214. In relevant part, the 10th Circuit's main holding was its finding that, "[t]he EPA exceeded its statutory authority in granting those petitions because there was nothing for the agency to 'extend.'" *Id.*⁴ The information requested, while of concern perhaps to the *Renewable Fuels Ass'n* plaintiffs or the refining industry, does not appear to be a topic of a "breaking news story of general public interest." See *Wadelton v. Dep't of State*, 941 F. Supp.2d 120, 123 (D.D.C. 2013).

Further, the Appellant's reliance on Deputy Secretary Menezes's testimony at the May 2020 Senate Committee hearing regarding the 10th Circuit decision also fails to demonstrate that the Appellant's FOIA request concerns a matter of current exigency. While the Appellant emphasizes that the Deputy Secretary and Senator Lee used the words "expeditiously" and "important issue," the Appellant fails to draw a link between the language of Deputy Secretary Menezes and Senator Lee in recognizing the importance of the DOE's consultative role in scoring the SRE petitions, and any type of current exigency to the American public regarding the Appellant's FOIA request. See *In the Matter of the Environmental Defense Fund*, FIA-17-0014 (2017) citing *In the Matter of Associated Press*, TFA-0273 (2008) ("Courts have denied requests for expedited processing if the requester fails to demonstrate urgency."). The requested documents, even if important, do not appear to concern a topic of pressing public interest that would justify expedited processing.

³ For the purposes of this Decision only, we will assume *arguendo* that the Appellant is a person primarily engaged in disseminating information.

⁴ The Court explained that the EPA did not have authority to extend the refineries' exemptions since none of the three small refineries had consistently received an exemption in the years preceding its petition. *Renewable Fuels Ass'n* at 1214, 1244-45.

Regarding the second factor of the “urgency to inform” test, the Appellant fails to establish that the consequences of delaying a response would compromise a significant recognized interest. The Appellant asserts that a delayed response will compromise the interests of the American people in several court cases because “[r]efiners have indicated that they will ask the U.S. Supreme Court for a writ of certiorari to review the [10th Circuit’s] decision.” Appeal at 1. It is a stretch of logic to assume that the consequence of failing to provide expedited processing of Appellant’s request would implicate a significant recognized interest. More significantly, Appellant fails to identify any specific significant interest that could be affected by the failure to provide expedited processing. While *Renewable Fuels Ass’n* affects a specific interest of the refiners in that case, there is no evidence that any tangible greater interest would be furthered by expedited processing. Appellant has failed to provide sufficient evidence for us to conclude that failing to provide expedited treatment to its FOIA request would compromise a significant interest. In sum, Appellant’s request does not warrant expedited processing.

III. Order

It is hereby ordered that the appeal filed on September 3, 2020, by National Biodiesel Board, Case No. FIA-20-0043, is denied.

This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769
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